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IN THE

Supreme Court of the United States

October Term 1967

No. 493

VICTOR E. ORIGONI,

Petitioner,

v.

BULLETIN COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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32 Stat. 544; Feb. 1, 1907, ch. 445
34 Stat. 874] . . . . . .

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No. _____

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BULLETIN COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Origoni petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 8, 1967.

On August 7, 1967 Petitioner moved this Court for an extension of time to August 14 in which to file this Petition.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A 1-2) issued May 8, 1967. It is not yet officially reported. The bulletins application for permission to appeal from an interlocutory order of the United States District Court pursuant to 28 U.S.C. 1292 (b) was granted November 28, 1966. (Appendix B, *infra*, p. B 1-2). The opinion of the United States District Court for the District of Columbia (Appendix C, *infra*, pp. C 1-11) issued September 16, 1966. It is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1967 (Appendix A, *infra*, pp. A 1-2). The jurisdiction, of this court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Whether Bulletin Company, a foreign corporation, is doing business within the District of Columbia so as to make it amenable to the jurisdiction of District of Columbia Courts.

STATUTE INVOLVED

S 13-334 D. C. Code Service on Foreign Corporations:

> (a) In an action against a foreign corporation doing business in the District, process may be served on the agent of the corporation or person conducting its business, or, when he is absent and cannot be found, by leaving a copy at the principal place of business in the District, or, where there is no such place of business, by leaving a copy at the place of business or residence of the agent in the District, and that service is effectual to bring the corporation before the court.

(b) When a foreign corporation transacts business in the District without having a place of business or resident agent therein, service upon any officer or agent or employee of the corporation in the District is effectual as to actions growing out of contracts entered into or to be performed, in whole or in part, in the District of Columbia or growing out of any tort committed in the District (Dec. 23, 1963, 77 Stat. 513 Pub L 88-241 S1).

Based on D. C. Code 1961 ed. 13-103 (March 3, 1901 ch. 854 section 1537, 31 Stat. 1419; June 30, 1902 ch. 1329, 32 Stat. 544; Feb. 1, 1907 ch. 445 34 Stat. 874).

STATEMENT

A. The District Court's Findings of Fact.

This is an action for libel. The publication claimed to be defamatory is an article contained in an issue of the "Sunday Bulletin", a newspaper published in Philadelphia, in effect charging the plaintiff, an expert chemist, with divulging his employer's trade secrets to an outsider. The plaintiff resided in Vienna, Virginia, which is within the Washington Metropolitan area. There are three defendants: Bulletin Company, the publisher of the newspaper; District News Company, Inc., Washington Distributer of the Newspaper; and Drug Fair of D. C. Inc., which operates stores in the District of Columbia where this newspaper is sold. (Appendix C, *infra*, p. C-1).

The defendant Bulletin Company moved to quash service of the summons and to dismiss the complaint for lack of jurisdiction over the person. The basis of the motion is a claim that this defendant is not doing business in the District of Columbia It is a corporation organized under the laws of Pennsylvania. The defendant Bulletin maintains a permanent office in the District of Columbia and has done so for over 30 years. This

office is a suite in an office building in the downtown section of Washington, and is composed of four rooms. Its annual rent is $3,144. A staff is permanently stationed at these headquarters and consists of a chief of the Bureau, two additional reporters and a secretary. Their annual payroll is about $51,000. In addition the employees are paid expenses incurred in performance of their duties. The office is equipped with four telephones. The defendant's name is listed in the Washington telephone directory, both in the alphabetical and classified sections. Supplies for the Washington office are purchased in the District of Columbia. The activities conducted at the Washington Bureau of the Bulletin consist of gathering news and forwarding it to the main office in Philadelphia where the newspaper is edited and published. The annual telephone bill is approximately $4,500 most of which is spent on long distance calls for transmission of news from the Washington Bureau to Philadelphia.

The newspaper is sold at newsstands in the District of Columbia. During the fiscal year preceding the institution of this action, its circulation in this District amounted to 309 copies of the Sunday edition and 135 copies of the daily edition. Sales took place at newsstands within the District and to subscribers by mail. (Appendix C, *infra,* p. C-2).

The gathering and transmission of news are among the basic activities of a newspaper publisher and indispensable and fundamental to the publication of the newspaper. Thus an important part of the publisher's business is regularly and continuously conducted in the District of Columbia at the permanent office located here. (Appendix C, *infra,* p. C-3). The District Court found no discernible reason for applying a different doctrine to Bulletin as a newspaper publisher than that which governs the transactions of persons and concerns engaged in other lines of endeavor. (Appendix C, *infra,* p. C-4) It found

nothing unfair in subjecting the Bulletin Company to responding to the process of the local Courts and defending a suit here. (Appendix C, *infra,* p. C-10) On the other hand, it found that it would be burdensome to require the Petitioner to go to Philadelphia in order to seek to vindicate his rejects. (Appendix C, *infra,* p. C-10).

B. The District Court's Decision and Order.

The District Court denied the Bulletin Company's Motion to quash service of summons and dismiss the complaint. It noted that Bulletin Company relied solely on two decisions of the Court of Appeals for this circuit viz *Neely v. Philadelphia Inquirer Co.* 61 App. D. C. 344, 62 F2d 872, decided in 1932, and *Layne v. Tribune Co.* (1934) 63 App. D. C. 213 71 F. 2d 223 *cert. den.* 292 U.S. 572, decided in 1934, which held that those newspapers were not doing business in the District of Columbia, but the Court concluded that the latter cases no longer represent the law and were overruled *sub silentio* by *Fiat Motor Company v. Alabama Imported Cars, Inc.,* 110 U. S. App. D. C. 252, 254, 292 F 2d 745. The Court's conclusion was based on a study and an analysis of the developments in this field subsequent to the *Neely* and *Layne* decisions. The court noted therein the changes in the principle as to what constitutes doing business within the state on the part of a foreign corporation and the adoption of a much more liberal doctrine than that which formed the basis for the *Neely* and *Layne* decisions citing *International Shoe Company v. State of Washington* 326 U. S. 310 (1945), *Perkins v. Benguet Mining Company* 342 U. S. 437 and *MeGee v. International Life Ins. Co.,* 355 U. S. 220. The District Court also found that the changes involved in the latter three cases were followed in the District of Columbia by the Court of Appeals decisions in *Goldberg v. Southern Builders,* 87 U. S. App. D. C. 191, 184 F 2d 345

and *Fiat, supra.* Accordingly, it found that Bulletin was doing business in the District of Columbia since its contacts here were systematic and continuous, and a fundamental portion of its regular business was conducted here.

It held that Bulletin Company was doing business in the District of Columbia under the "fair play and substantial justice" test of the *International Shoe Company* case.

C. The Court of Appeals Decision.

The *Neely* and *Layne* cases were not overruled *sub silentio* and are still controlling.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals that *Neely* and *Layne* were not overruled misapplies the rationale of this Court's decisions in *International Shoe, Perkins v. Benguet,* and *McGee v. International Life Ins. Co.* and presents an important question respecting interpretation of the statute involved herein which this Court should decide.

1. (a) In *International Shoe,* the company was a Delaware corporation engaged in the manufacture and sale of shoes and had its principal place of business in St. Louis, Missouri. It maintained establishments in several states, but none in the State of Washington. It did not have any office and did not keep any stock of merchandise in that State. It employed a number of salesman in the State of Washington, who were under the direct supervision of the St. Louis office. These salesmen resided in Washington and were compensated by commissions based on the amount of their sales. The corporation supplied them with a line of samples, each consisting of one shoe of a pair. On occasion they rented rooms for exhibiting samples. The Supreme Court of the State of Washington found that the

corporation was doing business within that state. The decision was affirmed by this Court which held that there was no violation of due process of law in ruling that the activities of the company constituted doing business within the state. Mr. Chief Justice Stone wrote that it was sufficient if the defendant had certain minimum contracts within the state such "that the maintainence of the suit does not offend 'traditional motions of fair play and substantial justice'." (p. 316). Mr. Justice Black wrote a concurring opinion. There were no dissents.

In *Perkins v. Benguet Mining Co.*, 342 U. S. 437, 447, in which Mr. Justice Burton wrote the opinion, the defendant corporation was organized under the laws of the Phillipine Islands and owned mining property there. Its operations were halted during World War II because of the occupation of the Islands by the Japanese. In the interim, the President of the Company returned to his home in Ohio and maintained an office there where he conducted both his personal affairs and also did many things in behalf of the company, such as carrying on its correspondence, keeping its office files, and the like. The Supreme Court of Ohio held that the due process clause of the Fourteenth Amendment prohibited the Ohio Courts from exercising jurisdiction over the corporation. This Court reversed the judgment of the State Court. Mr. Justice Burton stated (p. 444) that the conception relating to the service of process on foreign corporations had been modified in recent decisions and particularly in *International Shoe Company v. State of Washington, supra.* His opinion stated:

> "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting

> that corporation to the jurisdiction of the courts of that state through such service of process upon that representative.

In *McGee v. International Life Ins. Co.*, 355 U. S. 220, in which Mr. Justice Black wrote the opinion for a unanimous bench, a resident of California bought a life insurance policy from an Arizona insurance company, whose principal place of business was in Texas. It maintained no office and had no agents in California. The transaction was handled entirely by mail. The beneficiary of the policy brought suit against the insurance company in a California Court. Process was served by substituted service, registered mail, directed to the defendant's principal place of business in Texas. The plaintiff recovered judgment. Unable to collect it in California, the plaintiff brought suit on the judgment in a Texas court. The Texas courts refused to enforce the judgment, holding that it was void under the Fourteenth Amendment. This Court held on *certorari* that the California court had properly exercised jurisdiction over the insurance company and that, therefore, the Texas courts erred in refusing to give the judgment full faith and credit. This court indicated that a foreign corporation may be subjected to a judgment *in personam* if it has certain minimum contacts with the State, such that the maintainence of the suit does not offend "traditional motions of fair play and substantial justice" (p. 222). The opinion contains this observation:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may in-

> volve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity. (pp. 222-223).

An application of the standards of "fair play and substantial justice," established in the *International Shoe Company* case, to the facts herein requires the result that Bulletin Company is doing business in the District of Columbia and is subject to service of process. Bulletin's contacts with the District of Columbia included maintainence of a permanent office. There, permanently maintained by a staff of employees, in which an important part of its business and functions are transacted, and where it spends a considerable amount of money. There is nothing unfair in subjecting Bulletin to responding to the process of the local courts and defending a suit here. On the other hand, it would be burdensome to require the plaintiff, a resident of the Metropolitan Washington area, to go to Philadelphia in order to seek to vindicate his regrets.

(b). The *International Shoe Company, Perkins, and McGee* cases, *supra,* overruled the "solicitation plus," "consent" and "presence" tests of constitutional due process established in *Green v. Chicago, Burlington and Quincy Railway Company,* 205 U. S. 530 (1907); *St. Louis Southwestern Railway Company v. Alexander,* 227 U. S. 218 (1913); *International Harvester Company v. Kentucky* 234 U. S. 579 (1914); and *Philadelphia and Reading Railway Company v. McKibbin,* 243 U. S. 264 (1917). The latter four cases controlled *Neely* and *Layne* wherein the Court of Appeals interpreted the existing

statute in light of the "solicitation plus" requirement for Constitutional due process set down in *Green*. In the instant case the Court of Appeals erred by extending the *Neely* doctrine, premised on an overruled 1907 decision requiring "solicitation plus", to the facts herein, and by refusing to consider whether Bulletin Company had the minimum contacts with the District of Columbia necessary to establish jurisdiction under *International Shoe Comapny*. The statute involved is a remedial statute and should be liberally construed under prevailing constitutional requirements. The court below also erred in refusing to extend this remedial statute to newspapers, as such, on the basis that this was not in the public interest. The history and language of the statute make no exemption for newspapers. The court's ruling in this regard (See *Neely* 61 App. D. C. 334, 336) militates against the object of the statute and the spirit and letter of *International Shoe Company*. Washington, D. C. abounds in newspaper operations similar to those of Bulletin Company by American and foreign newspapers alike. To hold that these are not subject to the jurisdiction of the local courts could require an aggrieved American citizen to pursue his remedy to the far corners of the earth, and would in effect deprive him of a remedy.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed May 8, 1967]

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 20,704

BULLETIN COMPANY, Appellant

v.

VICTOR E. ORIGONI, Appellee

Appeal from the United States District Court for the District of Columbia

Before: WRIGHT, McGOWAN and ROBINSON, Circuit Judges.

ORDER

This cause came on for hearing on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

This interlocutory appeal certifies for our consideration the question as to whether *Layne* v. *Tribune Co.*, 63 App. D.C. 213, 71 F. 2d 223, *cert. denied*, 293 U. S. 572 (1934), and *Neely v. Philadelphia Inquirer Co.*, 61 App. D. C. 334, 62 F. 2d 873 (1932), have been overruled *sub silentio*. We hold that they have not.

It is ORDERED that the judgment of the District Court denying the motion to quash service of summons and dismiss the complaint be, and it is hereby, reversed.

Per Curiam.

Dated: May 8, 1967

APPENDIX B

[Filed November 28, 1966]

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

Misc. No. 2920

Bulletin Company, et al.,

Applicant,

v.

Victor E. Origoni,

Respondent.

Before: Bazelon, Chief Judge;
Fahy and Wright, Circuit Judges,
in Chambers.

ORDER

On consideration of applicant's application for permission to prosecute an appeal pursuant to 28 U.S.C. Section 1292(b) from an interlocutory order of the District Court, and it appearing that the District Court, in its opinion and accompanying order concluded that two decisions of this Court "must be deemed to have been overruled sub silentio", thereby presenting a "controlling question of law as to which there is substantial ground for difference of opinion", and it further appearing that the District Court and this Court are of the view that allowance of an appeal, under these circumstances, may materially advance the ultimate termination of the litigation, it is

ORDERED by the court that the aforesaid application be granted, and the applicant is permitted to appeal from the order of the District Court entered October 18, 1966.

Per Curiam.

APPENDIX C

UNITED STATES DISTRICT COURT

For The District Of Columbia

VICTOR E. ORIGONI, Plaintiff,
v. Civil Action No. 2310-65
BULLETIN COMPANY, ET AL., Defendants.

OPINION

Thomas M. O'Malley, of Washington, D.C. for the motion.

John R. McConnell, of Washington, D.C., opposed.

This is an action for libel. The publication claimed to be defamatory is an article contained in an issue of the "Sunday Bulletin", a newspaper published in Philadelphia, in effect charging the plaintiff, an expert chemist, with divulging his employer's trade secrets to an outsider. The plaintiff resides in Vienna, Virginia, which is within the Washington Metropolitan area. There are three defendants: Bulletin Company, Inc., the Washington distributor of the newspaper; and Drug Fair of D. C., Inc., which operates stores in the District of Columbia where this newspaper is sold.

The defendant Bulletin Company moves to quash service of the summons and to dismiss the complaint for lack of jurisdiction over the person. The basis of the motion is a claim that this defendant is not doing business in the District of Columbia. It is a corporation organized under the laws of Pennsylvania. D. C. Code 13-103, provides that "In actions against foreign corporations doing business in the District all process may be on the agent of such corporation or person conducting its business . . ."

The question to be determined is whether the defendant Bulletin Company is doing business in the District of Columbia.

The pertinent facts are not in dispute. They were elicited in part by answers to interrogatories, and in part by the deposition of the managing editor of the newspaper. The defendant maintains a permanent office in the District of Columbia, and has done so for over 30 years. This office is a suite in an office building in the downtown section of Washington, and is composed of four rooms. Its annual rent is $3,144. A staff is permanently stationed at these headquarters and consists of a Chief of the bureau, two additional reporters and a secretary. Their annual payroll is about $51,000. In addition the employees are paid expenses incurred in connection with the performance of their duties. The office is equipped with four telephones. The defendant's name is listed in the Washington telephone directory both in the alphabetical and classified sections. Supplies for the Washington office are purchased in the District of Columbia.

The activities conducted at the Washington Bureau of the Bulletin consist of gathering news and forwarding it to the main office in Philadelphia where the newspaper is edited and published. The annual telephone bill is approximately $4,500, most of which is spent on long distance calls for transmission of news from the Washington Bureau to Philadelphia.

The newspaper is sold at newsstands in the District of Columbia. During the fiscal year preceding the institution of this action, its circulation in this District amounted to 309 copies as to the Sunday edition, and 135 copies as to the daily edition. Part of the sales takes place at newsstands within the District and part consists of delivery to subscribers by mail.

The gathering and transmission of news are obviously among the basic activities of a newspaper publisher. The business of a newspaper may be said to consist of a number of steps: gathering of news and its transmission to the publication office; the securing of advertisements; the editing of the contents of the newspaper; and finally its printing and distribution. The first stage -- the gathering and transmission of news is indispensable and fundamental. Without this activity the newspaper cannot be published. Thus an important part of the business of the publisher is regularly and continuously conducted in the District of Columbia at a permanent office located here.

On principle it seems clear that the defendant Bulletin Company is doing business in the District of Columbia and, therefore, is subject to service of process here and to jurisdiction over its person in this Court. The situation is somewhat analogous to that of a manufacturing concern that has its principal factory in State A, and also has a branch plant in State B, where some component parts of the finished product are fabricated and from which they are transmitted to the main plant in State A. Manifestly, under such circumstances, such a concern would be said to be doing business in State B, as well as in State A, and, therefore, to be subject to service of process in State B, and to jurisdiction over its person in the local courts.

An entirely different situation is presented on those many occasions in which a newspaper temporarily sends one or more representatives to a particular locality in order to observe and re-

port a local event or a series of occurrences and then withdraws its personnel and maintains no permanent office within the jurisdiction. In such an instance it may well be said that the newspaper does not do business in that State, and that it would be unfair and unjust to subject its publisher to suit within that jurisdiction.

One may well wonder whether the defendant would contend if there were a dispute between it and one of its Washington employees over salaries or expenses, or a controversy with one of its local suppliers over a payment for office supplies, that the employee or supplier claimed to be aggrieved would have to go to Philadelphia to bring suit, and would not be in a position to do so in the District of Columbia. The fact that the present action is a suit for libel brought by a resident of the Washington Metropolitan area, does not lead to the invocation of a different principle. So, too, no reason is discernible for applying a different doctrine to a newspaper publisher that than which govern the transactions of persons and concerns engaged in other lines of endeavor.

Counsel for the defendant presented no argument based on principle or reasoning, but relied solely on two decisions of the Court of Appeals for this Circuit. The first is Neely v. Philadelphia Inquirer Co., 61 App. D. C. 334, 62 F. 2d 873, decided in 1932, in which it was held that the publisher of the "Philadelphia Inquirer" was not doing business in the District of Columbia. It had one Washington correspondent for the gathering of news, who occupied two rooms in an office building in this city. The second case is Layne v. Tribune Co., 63 App. D. C. 213, 71 F. 2d 223, cert. den. 293 U. S. 572, in which it was held that "The Chicago Tribune" was not doing business in the District of Columbia. The Court relied on its prior decision in the Neely case. In neither of these cases was there any evidence, so far as the opinion indicates, as to the amount of money expended by

the newspaper in the District of Columbia. In the instant case the expenditures are substantial as indicated above.

A study and an analysis of the developments in this field subsequently to these two decisions, leads this Court to the conclusion that the Neely and Layne cases no longer represent the law and must be deemed to have been overruled sub silentio. The changes in the principle as to what constitutes doing business within a State on the part of a foreign corporation, and the adoption of a much more liberal doctrine than that which had formed the basis for the Neely and Layne decisions, was inaugurated by the opinion of Mr. Chief Justice Stone in International Shoe Co. v. State of Washington, 326 U. S. 310, which was decided on December 3, 1945, - eleven years subsequently to the decision of the Court of Appeals in the Layne case. The International Shoe Company was a Delaware corporation engaged in the manufacture and sale of shoes and having its principal place of business in St. Louis, Missouri. It maintained establishments in several States, but none in the State of Washington. It did not have any office and did not keep any stock of merchandise in that State. It employed a number of salesmen in the State of Washington, who were under the direct supervision of the St. Louis office. These salesmen resided in Washington, and were compensated by commissions based on the amount of their sales. The corporation supplied them with a line of samples, each consisting of one shoe of a pair. On occasion they rented rooms for exhibiting samples. The Supreme Court of the State of Washington found that the corporation was doing business within that State. The decision was affirmed by the Supreme Court of the United States, which held that there was no violation of due process of law in ruling that the activities of the company constituted doing business within the State. On that aspect of the controversy Mr. Chief Justice Stone wrote that it was sufficient if the defendant had certain minimum contacts within the

State, such "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'," (p. 316). Mr. Justice Black wrote a concurring opinion. There were no dissents.

In Perkins v. Benguet Mining Co., 342 U. S. 437, 447, in which Mr. Justice Burton wrote the opinion, the defendant corporation was organized under the laws of the Philippine Islands and owned mining property there. Its operations were halted during World War II because of the occupation of the Islands by the Japanese. In the interim the President of the Company returned to his home in Ohio and maintained an office where he conducted both his personal affairs and also did many things in behalf of the Company, such as carrying in its correspondence, keeping its office files, and the like. The Supreme Court of Ohio held that the due process clause of the Fourteenth Amendment prohibited the Ohio courts from exercising jurisdiction over the corporation. The Supreme Court of the United States reversed the judgment of the State court. Mr. Justice Burton stated (p. 444) that the conception relating to the service of process on foreign corporations had been modified in recent decisions and particularly in International Shoe Company v. State of Washington, supra. His opinion continued:

> "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative."

In McGee v. International Life Ins. Co., 355 U.S. 220, in which Mr. Justice Black wrote the opinion for a unanimous bench,

a resident of California bought a life insurance policy from an Arizona insurance company, whose principal place of business was in Texas. It maintained no office and had no agents in California. The transaction was handled entirely by mail. The beneficiary of the policy brought suit against the insurance company in a California court. Process was served by substituted service, specifically by registered mail, directed to the defendant's principal place of business in Texas. The plaintiff recovered judgment. Unable to collect it in California, the plaintiff brought suit on the judgment in a Texas court. The Texas courts refused to enforce the judgment, holding that it was void under the Fourteenth Amendment. The Supreme Court held on certiorari that the California court had properly exercised jurisdiction over the insurance company and that, therefore, the Texas courts erred in refusing to give the judgment full faith and credit. The Supreme Court indicated that a foreign corporation may be subjected to a judgment in personam if it has certain minimum contacts with the State, such that the maintenance of the suit does not offend "traditional motions of fair play and substantial justice" (p. 222). The opinion contains the following significant observations:

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much

> less burdensome for a party sued to defend himself in a State where he engages in economic activity", (pp. 222-223).

Turning now to the later cases decided by the Court of Appeals for this Circuit, the first is Goldberg v. Southern Builders, 87 U. S. App. D. C. 191, 184 F. 2d 345. In that case a Delaware corporation acquired real property in Virginia and carried on construction work in that State. It maintained an office, however, in the District of Columbia, where it conducted some of the financial aspects of the enterprise. It was held that since the corporation had regular and systematic contacts with the District of Columbia, it was to be deemed to be doing business in this jurisdiction and, therefore, was subject to service of process.

A later case which marks the most significant development in this branch of the law in the District of Columbia, is Fiat Motor Company v. Alabama Imported Cars, Inc., 110 U. S. App. D. C. 252, 254, 292 F. 2d 745. In that case Judge Burger wrote the opinion and Judges Wilbur K. Miller and Bazelon concurred. Fiat Motor Company was a New York corporation with its principal place of business in New York City. It imported Fiat automobiles and sold them to wholesale distributors in this country. One of the distributors was the Roosevelt Automobile Company, a Delaware corporation with its principal place of business in the District of Columbia. An Alabama corporation, which was a retail dealer in Fiat cars, brought suit in this Court against Fiat and Roosevelt as co-defendants. Service of process on Fiat was accomplished by service on the President of Roosevelt within this District. Fiat moved to quash service. Its motion was denied and an interlocutory appeal allowed. The Court of Appeals affirmed the order of the District Court.

It appeared that Fiat had made an agreement with Roosevelt providing that the latter was to be the authorized distributor of Fiat Motor vehicles for the District of Columbia and adjoining States. By this contract Roosevelt was obligated to promote the sales of Fiat products, to use advertising materials provided by Fiat, to establish and equip places of business in the District of Columbia, and to keep and furnish to Fiat on request such records and reports as Fiat would require, as well as to maintain certain stated capital and to employ certain personnel. Fiat retained control over the designation of local Fiat dealers by Roosevelt.

The court observed that these and other provisions of the agreement manifested a continuous business relationship, involving the supervision and control by Fiat of numerous details of the business of Roosevelt. The Court concluded that "this relationship subjects Fiat to service in the District of Columbia". The Court, referring to the expression of Mr. Chief Justice Stone in International Shoe Co. v. Washington, supra, stated (p. 254):

> "Assuming that in the absence of controlling federal statute the matter is governed by the standards of 'fair play and substantial justice', Lone Star Package Car Co. v. Baltimore & O.R. Co., 5 Cir. 1954, 212 F. 2d 147, the contacts of Fiat with the District are of such substantial, continuing, and directory nature as to warrent the holding that it is doing business here in a manner which makes it subject to service of process in this jurisdiction. McGee v. International Life Ins. Co., 355 U. S. 220."

The contacts of Fiat with the District of Columbia were much more tenuous than those of defendant Bulletin Company in the case at bar. Fiat maintained no office, or permanent representative within the District of Columbia, and yet because of its

continuous control and supervision over the details of the business of its distributor in the District, it was held to be doing business within the District and, therefore, subject to service of process. In the instant case the defendant maintains a regular office and a permanent staff of employees within the District, who continuously carry on one of the necessary activities and aspects of its daily business.

It seems impossible to reconcile the Neely and Layne cases with the Fiat Motor Company case and, therefore, the former must be deemed to have been overruled sub silentio.

The Court reaches the conclusion from the foregoing discussion that the defendant Bulletin Company must be deemed to have been doing business in the District of Columbia and, therefore, is subject to service of process. It is not questioned that if it is subject to service of process, service was properly made.

From a practical standpoint and considerations of substantial justice, any other conclusion would seem inequitable. The standards of "fair play and substantial justice", a principle established in this branch of the law by Mr. Chief Justice Stone in the International Shoe Company case, seem to require the result that this Court has reached. The plaintiff is a resident of the Washington Metropolitan area. The defendant has a regular office in this District, permanently maintained by a staff of employees, in which an important part of its business and functions are transacted and where it expends a considerable amount of money. There is nothing unfair in subjecting the defendant to responding to the process of the local courts and defending a suit here. On the other hand, it would be burdensome to require the plaintiff to go to Philadelphia in order to seek to vindicate his rights.

Motion of defendant Bulletin Company to quash service of summons and dismiss the complaint is denied.

Alexander Stoltzoff
United States District Judge

September 16, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967 No. 493

VICTOR E. ORIGONI,
Petitioner,

v.

BULLETIN COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The opinions below are set forth in the petition for a writ of certiorari as Appendices A, B and C.

Jurisdiction

Respondent adopts the statement of jurisdiction as set forth in the petition for a writ of certiorari.

Question Presented

Where the District Court erroneously concluded that certain decisions of the Court of Appeals "had been overruled *sub silentio*" and need not be followed, and pursuant

to that conclusion entered an order in direct conflict with those decisions, did the Court of Appeals err in reversing the lower court for its failure to follow those decisions?

Statute Involved

The statute involved is set forth in the petition for a writ of certiorari at pages 2-3.

STATEMENT

Petitioner instituted this action against Bulletin Company, a Pennsylvania corporation which publishes the Evening and Sunday Bulletin in Philadelphia, Pennsylvania and two other defendants, District News Company, Inc., and Drug Fair of D.C., Inc., alleging that Bulletin Company published a libelous story about appellee in its Sunday Bulletin.

The defendant District News Company, Inc., is an independent newsdealer which purchases Bulletin Company's newspapers in Philadelphia and distributes them in the District of Columbia. The defendant Drug Fair of D.C., Inc. operates stores in the District where these newspapers are sold.

Service of process on Bulletin Company was attempted pursuant to D.C. Code, 1961 ed., Sup. V, § 13-334 by leaving a copy of the complaint at 1238 National Press Building, Washington, D.C. This is an office rented by Bulletin Company and staffed by three newsmen and a secretary. These employees have the sole duty of gathering news and transmitting it back to Philadelphia. This is the only office maintained by Bulletin Company in the District of Columbia.

In reliance on two previous decisions of the Court of Appeals for the District of Columbia Circuit holding that it was not the intention of Congress in enacting the section of the D.C. Code found at § 13-334 to make out-of-town newspapers which only maintain offices and reporters in

the District of Columbia for the purpose of gathering news amenable to service of process there, Bulletin Company moved to quash service of process on it. The District Court denied Bulletin Company's motion, holding that the previous decisions of the Court of Appeals relied on by Bulletin Company had been overruled *sub silentio.*

Bulletin Company applied for permision to take an interlocutory appear from this order under 28 U.S.C. 1292(b) and on November 27, 1966 this permission was granted.

The Court of Appeals on May 8, 1967, reversed the District Court and held that the previous decisions relied on by Bulletin Company had not been overruled *sub silentio* and were still the law of the District of Columbia.

Petitioner on August 15, 1967 filed a petition for a writ of certiorari with this Court in opposition to which this brief is respectfully submitted.

ARGUMENT

This case involves the construction and application of a local District of Columbia jurisdictional statute which is in no way in conflict with any decision of this Court.

This is an action for libel brought in the United States District Court for the District of Columbia under its local court jurisdiction and service of process is therefore governed by the provisions of the District of Columbia Code rather than those of the United States Code. *Fehlhaber Pile Co., Inc.* v. *Tennessee Valley Authority,* 81 U.S. App. D.C. 124, 125, 155 F.2d 864, 865 (1946). Service of process on Bulletin Company was attempted under D.C. Code, 1961 ed., Sup. V, § 13-334 by leaving a copy of the complaint at Bulletin Company's office in the District of Columbia.

Petitioner argues in spport of his petition for writ of certiorari that the decision of the Court of Appeals below

holding that it was not the intention of Congress in enacting the above cited statute to make out-of-town newspapers which only maintain offices and reporters in the District for the purpose of gathering news amenable to service of process there, misapplies the rationale of this Court's decisions in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 436 (1952), and *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

A cursory review of these cases is all that is necessary to demonstrate that they are in no way in conflict with the decision below. In the *International Shoe Co.* case, for example, the issues were first, whether within the limitations of the due process clause of the Fourteenth Amendment the defendant by its activities in the State of Washington had rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund and second, whether the state could exact those contributions consistently with the due process clause of the Fourteenth Amendment.

Similarly in the *Perkins* case the question was whether the due process clause of the Fourteenth Amendment precluded Ohio from subjecting a foreign corporation to the jurisdiction of its courts in an *in personam* action. And in the *McGee* case, the issue was whether the due process clause of the Fourteenth Amendment precluded a California court from entering a binding judgment against a Texas insurance company.

As the foregoing summaries demonstrate, all three of these cases dealt with the limitations imposed by the due process clause of the Fourteenth Amendment on state court jurisdiction. None of them were concerned with the proper construction of the District of Columbia jurisdictional statute involved in this case.

The inapplicability of these cases to the instant case was made clear by the Court of Appeals in its opinion in

Fandel v. *Arabian American Oil Co.*, 120 U.S. App. D.C. 193, 345 F.2d 87 (1965). In that case the court was called upon to decide whether an oil company was amenable to service under D.C. Code, 1961 ed., Sup. V, § 13-334. It was apparently argued by plaintiff's counsel that the *International Shoe Co.* case required an affirmative answer.

On the basis of the record before it, the court held that the oil company was not doing business in the District and disposed of the argument that the *International Shoe Co.* case required a different conclusion with the following language:

> "We are construing what a statute does, and not determining what the furthest reach of legislative power could be consistent and constitutional limitations." 120 U.S. App. D.C. at 195, 345 F.2d at 89.

That is precisely the issue in this case.

The District Court was properly reversed for its failure to follow the applicable decision of the Court of Appeals construing that statute.

In two prior decisions interpreting the jurisdictional statute at issue the Court of Appeals held that it was not the intention of Congress in enacting it to make out-of-town newspapers which only maintain offices and reporters in the District of Columbia to gather news amenable to service of process there. The first of these cases was *Neely* v. *Philadelphia Inquirer Co.*, 61 App. D.C. 334, 62 F.2d 873 (1932). There suit was brought against the Philadelphia Inquirer and service of process attempted under D.C. Code, 1929 ed., § 24-373. This section has been reenacted by Congress without substantive change as D.C. Code, 1961 ed., Sup. V, § 13-334.

The record before the court in the *Neely* case disclosed that the Inquirer leased two office rooms in the National Press Building and had a full time correspondent employed there. The newspaper paid the rent for the

office as well as all of the other expenses incidental to running the office. The Inquirer's name was on the door of the office and its name and telephone number were listed in the Washington telephone directory. The correspondent's duties were to gather news and transmit it back to Philadelphia.

On the basis of the foregoing record, the court held that such activity did not constitute "doing business" in the District of Columbia so as to make the Inquirer amenable to service of process:

> ". . . we think the mere collection of news material here for use in subsequent publications elsewhere, in the manner and extent shown in this case, is not a doing of business here, within the meaning of the statute.
>
> "As the seat of national government, Washington is the source of much news of national importance, which makes it desirable in the public interest that many newspapers should maintain vigilant correspondents here. If the employment of a Washington correspondent, the announcement of his address, and the payment of his office rent, subjects a nonresident newspaper corporation to legal process in Washington for matter appearing in its paper at home, it would bring in nearly every important newspaper in the nation, and many foreign publishing corporations, which in our opinion the present statute does not do." 61 App. D.C. at 336, 62 F.2d at 875.

Two years later the Court of Appeals was again called upon to construe this same section of the D.C. Code in *Layne* v. *Tribune Co.*, 63 App. D.C. 213, 71 F.2d 223, *cert. denied,* 293 U.S. 572 (1934). There the defendant newspaper also maintained an office in the District of Columbia and employed a staff consisting of a Chief Reporter, three reporters, and two telegraph operators.

The defendant leased a telegraph line from Washington to Chicago and had its telephone number listed in the Washington telephone directory. The Chief Reporter was authorized to employ additional telegraph operators and purchase supplies for the office in the District. The newspaper in which the story appeared, The Daily Tribune, was circulated extensively throughout the country.

On the basis of the foregoing facts, the court held that the case was governed by the *Neely* case and Tribune Co.'s plea to the jurisdiction of the District Court was sustained.

Both of these cases were subsequently followed by the United States District Court for the District of Columbia in *Bilbrey* v. *Chicago Daily News*, 57 F. Supp. 579 (D.C.D.C. 1944) This was an action brought by a member of the District of Columbia bar for an allegedly libelous story appearing in the defendant newspaper. The record disclosed that the defendant's only contact with the District of Columbia was its maintenance of a correspondent in the District to gather and transmit news. The Court held that the case was governed by the *Neely* and *Layne* cases and granted defendant's motion to quash service of process.

In the instant case the record makes clear that Bulletin Company's activity within the District of Columbia has been no greater nor of any different kind than that of the newspaper defendants in the aforecited cases. The District Court in denying Bulletin Company's motion to quash service of process in fact did not attempt to distinguish the *Neely* and *Layne* cases but rather concluded that they had been overruled *sub silentio* by subsequent cases citing *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 436 (1952); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Goldberg* v. *Southern Builders, Inc.*, 87 U.S. App. D.C. 191, 184 F.2d 345 (1950), and *Fiat Motor*

Co., Inc. v. *Alabama Imported Cars, Inc.*, 110 U.S. App. D.C. 252, 292 F.2d 745, *cert. denied*, 368 U.S. 898 (1961).

The two decisions of the Court of Appeals relied on by the District Court are factually distinguishable and in no way purport to overrule or modify the *Neely* and *Layne* cases.

In *Goldberg* v. *Southern Builders, Inc.*, 87 U.S. App. D.C. 191, 184 F.2d 345 (1950), a foreign corporation (Magnolia) was served as a garnishee. The record disclosed that Magnolia's articles of incorporation had been executed in the District of Columbia, its Board of Directors meetings were all held in the District, it had entered into a substantial contract in the District with an architect for the construction of a large housing project in Virginia and had executed the mortgage agreement for the project in the District; it had a bank account in the District and paid all of its bills by checks drawn on this account, and all of its records, books, correspondence, and checkbooks were in the custody of the secretary of the corporation whose office was in the District. This Court said:

> "It seems clear that Magnolia's contacts with the District have been regular and systematic. It also is clear, with regard to the reasonableness of suit here, that the District of Columbia is probably the most convenient forum to Magnolia. As we have noted, its books, records, officers, all are in the District. While the day-to-day operations of the housing project may be managed in Virginia, unquestionably the general operation and supervision of the corporation's affairs is conducted in the District. Although Magnolia was incorporated in Delaware, the District of Columbia, was, in effect, its home." 87 U.S. App. D.C. at 194, 184 F.2d at 348.

The facts of the foregoing case demonstrate without the necessity of additional argument how clearly distin-

guishable that case is from the case at bar. Certainly the *Goldberg* case cannot be said to overrule or modify the *Neely* and *Layne* cases in any sense whatever.

The second case of the Court of Appeals relied on by the District Court, *Fiat Motor Co., Inc.*, v. *Alabama Imported Cars, Inc.*, 110 U.S. App. D.C. 252, 292 F.2d 745, *cert. denied,* 368 U.S. 898 (1961), is also factually distinguishable from the instant case. In that case plaintiff was an Alabama corporation which brought suit under the Automobile Dealers' Franchise Act against Fiat Motor Company (Fiat), a New York corporation with its principal place of business in New York City, and Roosevelt Automobile Company (Roosevelt), a Delaware corporation with its principal place of business in the District of Columbia. Service of process on Fiat was attempted by leaving a copy of the complaint with the President of Roosevelt in the District of Columbia.

The record disclosed that Roosevelt had entered into a lengthy distributor sales agreement with Fiat whereunder Roosevelt was appointed an authorized distributor of Fiat vehicles, parts, and equipment for the District of Columbia and nine southeastern states. Roosevelt was obligated under the agreement to promote the sales of Fiat products, use advertising materials provided by Fiat, establish and equip to the satisfaction of Fiat places of business in the District of Columbia and Florida, maintain those locations in good condition, and change such locations only with the prior consent of Fiat. The agreement further required Roosevelt to keep records and reports as directed by Fiat and furnish them to Fiat upon request, maintain certain stated working capital and net worth, employ personnel in certain stated capacities, and insure their attendance at Fiat training schools.

After reviewing the relationship between Fiat and Roosevelt as evidenced by the agreement between them, the Court of Appeals concluded:

> "These and other provisions of the agreement manifest a continuing business relationship involving the supervision and control by Fiat of numerous details of the Roosevelt business. . . . In our view this relationship subjects Fiat to service in the District whether that issue is considered to be governed by federal or local standards." 110 U.S. App. D.C. at 254, 292 F.2d at 747.

Here again, the facts of the case distinguish it from the instant case.

In both the *Goldberg* and *Fiat* cases the defendant's activity within the District of Columbia was of a typical commercial nature and in neither was the corporate presence in the District required because of the unique status of Washington as the nation's capital. This element, which is missing in both of those cases, is actually the distinguishing characteristic of cases like *Neely* and *Layne*.

This same underlying policy has also been applied by the Court of Appeals even to commercial activity where the activity by necessity had to take place in the District of Columbia due to the presence of the federal government there. See, e.g., *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F.2d 142 (1945) (maintenance in Washington of a representative by a manufacturer for the purpose of gathering information from Government departments and for convenience of communication between the Government and the company in respect to Government work being done throughout the country held not to make manufacturer amenable to service of process in the District); *Fehlhaber Pile Co., Inc.* v. *Tennessee Valley Authority*, 81 U.S. App. D.C. 124, 155 F.2d 864 (1946) (maintenance of an office with a staff in Washington to obtain information concerning matters which might effect TVA, circulate information concerning TVA to public officials and to the public, arrange meetings between officials of TVA and officials of other agencies

of the government, represent TVA in purchases from other agencies and provide space and office service for TVA officials visiting Washington held not to make TVA amenable to service); *Traher* v. *DeHavilland Aircraft of Canada, Ltd.*, 111 U.S. App. D.C. 33, 294 F.2d 229 (1961) (Canadian aircraft manufacturer held not to be amenable to service of process where the record showed that the main plant of the defendant was in Canada and it maintained only a liaison or contact man with the United States government in Washington whose principal duties were to transmit information about the United States government's requirements and to keep in contact with the governmental agencies).

In the most recent case construing this statute, *Fandel* v. *Arabian American Oil Co.*, 120 U.S. App. D.C. 193, 345 F.2d 87 (1965), residents of California brought suit for personal injuries sustained in Saudia Arabia against a Delaware corporation. The defendant moved to quash service of process and dismiss the action for lack of jurisdiction on the grounds that it was not doing business within the meaning of D.C. Code, 1961 ed., Sup. V, § 13-334. The lower court granted defendant's motion and on appeal the lower court's order was affirmed.

The pleadings, affidavits, and depositions disclosed that the defendant had for several years maintained a six-room office in a downtown Washington office building occupied by five of its employees. The payroll of the office was $10,000 per month and the defendant's name was listed in the Washington telephone directory. All production and deliveries of the defendant, however, took place outside the District of Columbia and no business was solicited by advertising or otherwise in the District.

The defendant's office in the District of Columbia was primarily charged with maintaining continuing relationships with the State Department and other executive agencies of the United States government, with diplomatic missions accredited to the government, and with educa-

tional and international organizations, private and public, interested in or informed about the Middle East generally and Saudia Arabia in particular. These employees also gathered information of interest to the defendant and reported this back to the executive staff directing the business operations in Saudia Arabia. There were occasional contacts between defendant's employees and the Washington representatives of other American oil companies who transact business with defendant in the Middle East.

After noting the Washington office's importance to the company as a whole, the Court of Appeals noted that this office was in Washington only because Washington is the capital city of the United States. Because of this, the court held that the defendant's presence was of a kind which had been theretofore uniformly regarded as falling outside the range of congressional contemplation of the scope of doing business as that phrase is used in D.C. Code, 1961 ed., Sup. V, § 13-334. The court then cited with approval some of the cases discussed *supra* including the *Neely* and *Layne* cases.

> "These cases, although embodying variously different factual circumstances, seem to us to constitute a recognition that Washington presents many business organizations with special needs for a continuous and ponderable physical presence there, which needs are not those customarily associated with strictly commercial operations; and that the purpose of Congress was not to make that presence in every case a base for the assertion of personal jurisdiction." 120 U.S. App. D.C. at 195, 345 F.2d at 89.

The interpretation of D.C. Code, 1961 ed., Sup. V, § 13-334 as enunciated in the preceding cases has been approved and adopted by Congress. When the Court of Appeals decided both the *Neely* and *Layne* cases, the section of the D.C. Code authorizing service of process on

foreign corporations was found in the 1929 Edition at Title 24, Section 373. This section in its relevant portion read as follows:

> "In actions against foreign corporations doing business in the District all process may be served on the agent of such corporation or person conducting its business, or, in case he is absent and cannot be found, by leaving a copy at the principal place of business in the District, or, if there be no such place of business, by leaving the same at the place of business or residence of such agent in said District, and such service shall be effectual to bring the corporation before the court."

In 1963 Congress revised, codified and enacted the general and permanent laws relating to the judicial and judiciary procedures of the District of Columbia in Public Law 88-241, 77 Stat. 513. The section under which service of process was attempted here, which was codified as D.C. Code, 1961 ed., § 13-103 prior to the passage of the 1963 act, was re-enacted without substantive change as D.C. Code, 1961 ed., Sup. V, § 13-334.

It is well settled that where the courts have construed a statute and Congress thereafter re-enacts the statute without changing the settled construction, this indicates that the prior construction has become part of the "warp and woof of the legislation." *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948). The re-enactment of D.C. Code, 1961 ed., Sup. V, § 13-334 without substantive change requires this Court to "assume that it [Congress] has been satisfied with, and *adopted*, the construction given to its enactment by the Courts". *Electric Storage Battery Co.*, v. *Shimadzu*, 307 U.S. 5, 14 (1934). (Emphasis added.)

It is submitted that not only have the cases of the Court of Appeals construing D.C. Code, 1961 ed., Sup. V, § 13-334 not been overruled, but Congress has approved and adopted the court of Appeals construction of it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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